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CENTER FOR DEMOCRACY
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October 8, 2009

Senator Lawrence Bliss
Representative Charles R. Priest
Joint Standing Committee on Judiciary
115 State House Station
Augusta, MD 04333

Re: Public Law 2009, Chapter 230, An Act To Prevent Predatory Marketing Practices against Minors

Dear Senator Bliss, Representative Priest, and Members of the Joint Committee:

The Center for Democracy ("CDT") appreciates the opportunity to present to the Joint Standing Committee on Judiciary our concerns about Public Law 2009, Chapter 230 (the "Act"). Although we appreciate the concerns of the Legislature that prompted enactment of this Act, the language raises a broad range of constitutional problems, and the problems are so fundamental that we believe the Act must be repealed.

CDT is one of the leading civil liberties organizations in the United States focused on the application of the U.S. Constitution's First Amendment to speech on the Internet. In 1996, CDT led one of the consolidated legal challenges to the federal Communications Decency Act that resulted in the 1997 decision by the U.S. Supreme Court that speech on the Internet warrants the highest level of First Amendment protection. Since then, CDT has brought and litigated constitutional challenges to a number of state laws that sought to regulate or restrict speech over the Internet.

Six weeks ago, CDT was actively preparing to pursue a constitutional challenge against the Act, and we were consulting with the Maine Civil Liberties Union to see if we could work together on a lawsuit. Once the *Maine Independent College Association v. Mills* case was filed, we temporarily set aside our efforts to see if that case resolved the problems raised by the Act. We were pleased by the Court's conclusion that the *MICA* plaintiffs had met their burden to establish the merits of their claim that the Act violates the First Amendment, and we applaud the Legislature's decision to promptly revisit the Act.

The Act violates the First Amendment rights of both minors and adults, both inside and outside of the State of Maine. It also violates the Commerce Clause of the U.S. Constitution, and is preempted by one or more federal statutes. The Act

is unconstitutional both as it applies to "personal information" as well as to "health-related information." All of the three main substantive provisions of the Act – §§ 9552(1), 9552(2) & 9553 – raise serious constitutional problems, and the problems cannot be cured simply by severing a portion of the language. We urge this Joint Committee to take steps to repeal the Act in its entirety.

Before reviewing below some of the legal defects with the Act, we would like to set out a few of the very practical results – ranging from the trivial to the life-and-death – that would flow from the Act:

- Minors in Maine would be restricted from signing up to receive information from the Boston Red Sox. Although most parents might well consent to their child's receipt of such information, the cost and uncertainty of obtaining parental consent would lead many free information sources to restrict sending any information to minors in Maine. The Act would also lead websites and online services around the country to collect *more* personal information from *all* users, so as to be able to exclude Maine minors or all Maine residents. All of this would violate the free speech rights of both minors and adults, and would harm the privacy of a broad range of users.

- Minors in Maine would be prohibited from using very popular social networking services such as Facebook and MySpace, even though those services are open to older minors. On Facebook, for example, the expectation is that users create profiles using their full names, and thus *any* interaction among users on that service would cause Facebook to violate the Act's blanket prohibition on "transferring" information that identifies a minor (regardless of parental consent). And in any event, minors have First Amendment rights to engage in speech – including online speech – *without* having to obtain parental consent.

- Minors in Maine would also be prevented from using alternatives to the major social networks. For example, the Portland Diocese of the Catholic Church would almost certainly have to close a social network operated by the Prince of Peace Catholic High School Youth Ministry in Lewiston, Maine (*see* http://princeofpeace.ning.com/), because all social networking interaction in which real names are used would be prohibited by the Act (regardless of parental consent).

- Adults' ability to use social networks would also be constrained. The State of Maine (see http://www.facebook.com/pages/Augusta-ME/Mainegov/98519328240), the Maine Republican Party (see http://www.facebook.com/group.php?gid=50921153088), and the Maine Senate Democrats (see http://www.facebook.com/mainesenate?_fb_noscript=1) would all have to take steps to either prevent minors in Maine from becoming "fans" of their Facebook pages, or to alter how they use information about their fans.

- Minors' involvement in the political process would be limited by the Act. In this past Presidential election, both major candidates developed online campaigns specifically targeted at young people – including minors under 18 (some of whom turned 18 before Election Day). Under the Act, future candidates would have to take steps to prevent minors in Maine from participating in their youth-focused political activities. Minors in Maine would also be prevented from, for example, purchasing a bumper sticker or button online to show support for their candidate. The Act would limit political speech – both of minors and of candidates – infringing on an absolutely core purpose of the First Amendment.

- Online suicide prevention websites – such as Nineline run by Covenant House (see http://www.nineline.org/) – would have to curtail some (if not all) support or services to minors in Maine because they would not be able to gather personal or health information and then contact any other person about the minor's situation. Moreover, at the start of every significant interaction with at-risk minors in any state or country, Covenant House and similar sites would likely have to determine the minor's location to ensure that the minor is not from Maine. This is additional personal information that, but for the Act, these sites might not ordinarily collect. The Act applies offline as well, and thus even in-state youth-focused suicide prevention services – such as the Youth Crisis Stabilization Program in Bangor – would be constrained in what services they could offer to minors without obtaining parental permission; in some cases, this might discourage minors from seeking help in the first place.

These examples illustrate the potential impact of the sweeping scope of the Act, and why it must be repealed.

We appreciate that the Joint Committee has before it the legal arguments raised in the *MICA v. Mills* case, and we understand that the plaintiffs in that case will be presenting to this Committee much of the legal analysis that they presented to the court. We strongly agree with the constitutional arguments that the plaintiffs have made, and based on those arguments we believe that each of the three operative provisions of the Act are unconstitutional.

Rather than repeating many of those same arguments here, we will instead focus on a few key points:

- First, minors have strong free speech rights under the First Amendment. The U.S. Supreme Court has made clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to [minors]." *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Outside of the area of sexual content that may be "harmful to minors," minors – especially older minors – have a right to receive information just as adults do. *See Board of Education v. Pico*, 457 U.S. 853, 867-68 (1982). The First Amendment protects *both* the right of minors to receive the

information and the right of speakers to reach an audience of minors. This is true even in the area of information about health issues. A minor has a right to receive information about, for example, the prevention of sexually-transmitted diseases or the symptoms of anorexia, and can do so even without parental consent.

- Second, as we have seen with service providers' efforts to comply with the federal Children's Online Privacy Protection Act, very few online services can afford to undertake any "parental consent" process. Instead, many sites have simply taken steps to exclude minors from their sites altogether. Similarly, the likely reaction to the Act will be for many sites to attempt to prevent minors in Maine from using their sites at all. Rather than fostering parental involvement, the Act will simply curtail the lawful speech and services that are available to minors in Maine. Although that curtailment of speech will be done by private web sites, it will be done in response to the Act, and thus will violate the First Amendment. *See, e.g., Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (overturning private censorship that resulted from compliance with state law).

- Third, the Act will have a significant harmful impact on the free speech and privacy rights of adults. Some websites will decide to exclude *all* visitors from Maine rather than risk the penalties or lawsuits under the Act. And many sites will be forced to collect personal information that they would not otherwise collect from *all* of their users, in order to weed out or specially handle users from Maine. This would harm the privacy of all users, whether they had any relationship to Maine or not.

- Fourth, this type of broad regulation aimed at a group of speakers on the Internet violates with Commerce Clause of the U.S. Constitution. Online service providers reach across state lines and are unable to effectively comply with state-by-state laws regulating their interactions with users. Court after court across the country has struck down state attempts to regulate speech on the Internet as violating the Commerce Clause. *See, e.g., PSINet v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Ass'n v. Dean*, 342 F.3d 96 (2d Cir. 2003); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Because the Internet is a truly seamless and global medium – spreading across state and national borders – that has tremendous social, political, and economic value, it is not appropriate to subject it to local regulations that are disparate and even contradictory. Even when the speaker and the listener are located in the same state, there is very good chance that the communication crosses state lines.

There are other constitutional and legal defects with the Act, and they cannot be simply solved or addressed. Because of these problems, we urge the Legislature to repeal the Act.

As a final consideration, we note that litigation to defend unconstitutional laws is extremely expensive for the state. Because the Act plainly violates the First Amendment and Commerce Clause of the U.S. Constitution, a further legal challenge is sure to follow if the Act is re-passed with some or all of its constitutional defects, and the costs to the taxpayers of Maine to defend the law will be high. Over the past 12 years, in 14 constitutional challenges to regulations of the Internet and other new technologies, the average cost to the government (in both fees paid to plaintiffs' attorneys and the cost of defense) has been in the neighborhood of $500,000. We suggest that a far more effective use of those funds would be to appropriate money for the Attorney General to investigate and bring legal action – using existing legal authority under Title 5, Chapter 10 – against the unfair trade practices that were the motivation for the Act.

We appreciate the opportunity to present our views to the Joint Committee. We would be happy to provide any additional input or briefing that might assist the Committee.

Sincerely,

/s/

John B. Morris, Jr.
General Counsel